IP 01-1930-C M/S Jordan v Ridge
Judge Larry J. McKinney Signed on 2/22/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JORDAN, PAMELA J,	)	
	)	
Plaintiff,	)	
vs.	)	
	)	
O'NEILL, PAUL H SECRETARY, UNITED STATES DEPARTMENT OF TREASURY,	)	CAUSE NO. IP01-1930-C-M/S
	)	
Defendant.	)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

PAMELA J. JORDAN Plaintiff, vs. TOM RIDGE, SECRETARY, U.S. DEPARTMENT OF HOMELAND SECURITY, Defendant.	)))))))))	IP 01-1930-C-M/S

ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on defendant's, Tom Ridge, Secretary, U.S. Department of Homeland Security, ("Customs" or "the Customs Service")[1] Motion for Summary Judgment. Plaintiff Pamela J. Jordan ("Jordan") claims that Customs discriminated against her on the basis of her race and retaliated against her for complaining about this alleged discrimination. The Customs Service asserts that the vast majority of her allegations are identical to those adjudicated in other lawsuits and are barred by *res judicata* and, alternatively, that she cannot satisfy the burden-shifting analysis necessary to bring a claim of discrimination based upon indirect evidence.

For the reasons stated herein, the Court **GRANTS** defendant's Motion for Summary Judgment.

I. BACKGROUND

Jordan is an African-American female and worked for the Customs Service from 1988 to

[1] Effective March 1, 2003, Customs became part of the Department of Homeland Security. *See* Public Law 107-296. Due to the restructure, the part of Customs in which Jordan was employed became a component of the Bureau of Customs and Border Protection.

2001. She has brought four unsuccessful lawsuits against Customs alleging that numerous employment decisions affecting her over a long period of years have been the result of intentional discrimination based on her race and in retaliation for opposing discrimination. *See* Cause Nos. IP 97-1524-C-T/G ("*Jordan I*"); IP 98-1092-C-H/G ("*Jordan II*"); IP 00-0157-C-H/G ("*Jordan III*"); IP-02-236-C-Y/S ("*Jordan IV*") (collectively "previous cases").[2]

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Ill. Cent. R. Co. v. South Tec Dev. Warehouse, Inc*., 337 F.3d 813, 816 (7th Cir. 2003). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted. *Abrams v. Walker*, 307 F.3d

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[2] Judge Tinder granted summary judgment for Customs in *Jordan I*, and the Seventh Circuit affirmed that judgment in *Jordan v. Summers*, 205 F.3d 337 (7th Cir. 2000) (finding that Jordan's evidence of discrimination and grooming was nothing more than speculation). *Jordan II* was brought before Judge Hamilton. Summary judgment was granted in part and denied in part. After a trial on a contested and controlling issue of fact with respect to defendant's assertion that Jordan failed to bring timely administrative complaints of discrimination, the Court found that the defense was valid and entered final judgment in favor of Customs on January 24, 2001. *Jordan III* was also brought before Judge Hamilton, and the court granted Customs' Motion to Dismiss, as the third action added nothing to the prior cases that had already been dismissed. The decision was affirmed by the Seventh Circuit in *Jordan v. O'Neill*, 2002 WL 193874 (7th Cir. Feb. 5, 2002) (affirming on grounds of *res judicata*). *Jordan IV* was brought before Judge Young. Judge Young struck paragraphs 8-18 of Jordan's Complaint under the doctrine of *res judicata*, and granted summary judgment in favor of Customs on Jordan's remaining claims. *Jordan IV* is presently on appeal before the Seventh Circuit in *Jordan v. Ridge*, No. 04-2094.

650, 653 (7th Cir. 2002), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court construes all facts and draws all reasonable inferences in the light most favorable to the nonmoving party. *See Butera v. Cottey*, 285 F.3d 601, 605 (7th Cir. 2002).

Because the purpose of summary judgment is to isolate and dispose of factually unsupported claims, the non-movant must respond to the motion with evidence setting forth specific acts showing that there is a general issue for trial. *See Michael v. St. Joseph County*, 259 F.3d 842, 845 (7th Cir. 2001). To successfully oppose the motion for summary judgment, the non-movant must do more than raise a "metaphysical doubt" as to the material facts. *See Wolf v. N.W. Ind. Symphony Soc'y*, 250 F.3d 1136, 1141 (7th Cir. 2001). A scintilla of evidence in support of the non-movant's position is not sufficient to defeat a summary judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252. If a reasonable fact finder could find for the opposing party, then summary judgment is inappropriate. *See Shields Enters., Inc. v. First Chi. Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992). When the standard embraced in Rule 56(c) is met, summary judgment is mandatory. *See id.*

III. DISCUSSION

Both of Jordan's claims incorporate by reference factual allegations contained in Complaint paragraphs 1-31. The Court's duty is to determine if the factual allegations supporting the claims have been or should have been brought in Jordan's previous cases.

The purpose of *res judicata* is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Otherwise known as claim preclusion,

res judicata applies where there is: (1) an identity of the causes of actions; (2) an identity of the parties or their privies; and (3) a final judgment on the merits. *See Kratville v. Runyon*, 90 F.3d 195, 197-98 (7th Cir. 1980).

Jordan challenges only whether there is "identity" of the causes of action brought before the Court, but her arguments are unpersuasive. In conclusory fashion, and without reference to her exhibits or case law, Jordan states only that "[t]he issue in this case is not the same as the issue in the other cases." Pl.'s Br. Opp. at 30. It is well established that a party will be successful in opposing summary judgment only when it presents definite, competent evidence to rebut the motion. *See e.g., Smith v. Severn*, 129 F.3d 419, 427 (7th Cir. 1997). While it is the Court's responsibility to determine if genuine issues of material fact exist, "[t]he parties . . . bear a cocomitant burden to identify the evidence that will facilitate this assessment." *Waldridge v. Am. Hoechst Corp*., 24 F.3d 918, 920 (7th Cir. 1994). *See also United States v. Dunkel*, 927 F.3d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.") (*per curiam*). Instead, Jordan attached to her brief, more than 2,000 pages of exhibits.[3] The Seventh Circuit has disapproved of this tactic, emphasizing that "it is simply not true . . . that if a litigant presents an overload of irrelevant or nonprobative facts, somehow the irrelevancies will add up to relevant evidence of discriminatory intent. They do not; zero plus zero is zero." *Gorence v. Eagle Food Centers, Inc*., 242 F.3d 759, 762-63 (7th Cir. 2001). Jordan fails to explain how the issues in the instant suit differ from those brought in *Jordan I, II, III*, and *IV*.

Jordan also argues that *res judicata* does not apply and the Court should hear previously

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[3] The Court notes that many of Jordan's exhibits were never cited in the Discussion section of her Brief in Opposition. These include exhibits 3-8, 10-14, 16-17A, 19, 23, 24, 27-28, 31-32, 35-43, 74-82, 131, 133, and 138-140.

litigated allegations because her other cases were "preliminary," and that, as she obtains more evidence, she should be allowed to argue them again.[4] Pl.'s Br. Opp. at 29-30. Yet Jordan concedes, in the first line of her discussion regarding *res judicata* that the doctrine bars recovery of damages on the same claim. *Id*. at 29. Her erroneous assertion is contrary to the very purpose of *res judicata*.

Finally, Jordan cites a litany of cases under a "continuing violation" theory, none of which involve plaintiffs whose claims had previously been decided on the merits.[5] *See* Pl.'s Br. Opp. at 33-34. The "continuing violation" doctrine cannot be used to circumvent *res judicata*. Instead, the doctrine "allows a plaintiff to get relief for a time-barred act by linking it with an act that is within the limitations period." *See Selan v. Kiley*, 969 F.2d 560, 564 (7th Cir. 1992). The purpose of this theory is to permit the inclusion of acts whose discriminatory character was not apparent at the time they occurred. *See Speer v. Rand McNally & Co*., 123 F.3d 658, 663-64 (7th Cir. 1997). The statute of limitations is not at issue here, and the cases cited by Jordan do not help her avoid the application of *res judicata* to her claims.

The allegations contained in paragraphs 7-19 and 27-30 of the instant Complaint have been

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[4] Jordan attempts to liken her cause of action to tobacco litigation, where evidence used in early cases was used in later cases, effectively providing a more thorough view of the defendants' liability. However, Jordan fails to recognize that, among other differences, plaintiffs in tobacco litigation are different and arise from different underlying facts. Jordan plainly ignores the fact that she, as the plaintiff, is bringing allegations previously litigated and adjudicated, against the very same party.

[5] At some length, Jordan argues that it was Customs who "insisted on multiple lawsuits, not the plaintiff." Pl.'s Br. Opp. at 31. Again, Jordan fails to cite to the Court any evidence to support her assertion. Even if Customs had insisted as alleged, Jordan is free to pursue her claims of racial discrimination and retaliation according to the applicable law of this jurisdiction and Federal Rules of Civil Procedure, not based upon the "wish" of her employer as to how such claims should be brought.

raised before and rejected by other Judges in this district in *Jordan I, II, III,* and *IV*, and, of those decisions appealed by Jordan, upheld by the Seventh Circuit. Compare Paragraphs 7-17 of the instant Complaint to paragraphs 7-17 in *Jordan III* and *Jordan IV*, as well as paragraphs 18-19 of the instant Complaint to paragraphs 18-19 of *Jordan IV*. Further, compare paragraphs 27-30 of the Complaint in this case to paragraphs 73-76 of *Jordan III* and Paragraphs 26-29 of *Jordan IV*.

The only factual allegations presented in this case that Jordan has not *identically* alleged in previous litigation, are as follows:

> 20. On about November 13, 1995, the defendant notified Ms. Jordan that her detail would not be extended due to lack of work on the Forfeiture Fund Team, when in fact, there was work for Ms. Jordan on the Forfeiture Fund Team.
>
> 21. On about November 13, 1995, Ms. Jordan was not granted a reassignment to another position of the Forfeiture Fund Team.
>
> 22. On or about November 13, 1995[,] and later dates, Ms. Jordan was excluded from overtime hours.

Comp. ¶¶ 20-22.

The Court also finds that these remaining allegations material to both counts should have been brought in *Jordan IV*.[6] Parties are not barred only from litigating those issues that were decided in the prior action, but also any related matters that could have been raised in the original action. *See Comm'r of Internal Revenue v. Sunnen*, 33 U.S. 591, 597 (1948); *Kratville*, 90 F.3d at 197-98. The basic rule for determining whether two causes of action are, in fact, the same is

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[6] Although Defendant did not specifically argue that these three factual allegations should have been brought in Jordan's previous cases, and instead argued the merits of a claim under such factual allegations, Defendant raised the issue of *res judicata* on both counts of Jordan's complaint. This is sufficient to put Jordan on notice of Defendant's argument that the factual allegations that form the basis for both counts may be barred. Moreover, Jordan's Brief in Opposition presents argument as to why *res judicata* should not bar the instant causes of action that are not particular to any subset of factual allegations. Instead, Jordan attacks application of the doctrine as it pertains to all aspects of her claims.

whether or not they are based on the same, or nearly the same, factual allegations arising from the same transaction or occurrence. *See Brzostowski v. Laidlaw Waste Sys., Inc*., 49 F.3d 337, 338-39 (7th Cir. 1995).

The principle that *res judicata* extends to all matters within the purview of the original action, whether or not they were actually raised, is tantamount to a rule requiring parties to consolidate all closely related matters into one suit. *See Welch v. Johnson*, 907 F.2d 714, 720 (7th Cir. 1990). A review of the factual findings in *Jordan IV* reveals a lengthy discussion of Jordan's temporary assignment to the Forfeiture Fund Team ("FFT") and subsequent return to her permanent assignment with the Internal Reoccurring Obligation ("IRO") Unit. *See* Def.'s Exh. 17, pp. 4-7. Judge Young considered and ultimately rejected Jordan's allegation that Customs' decision not to assign her to the FFT was based on her race and in retaliation for her previous EEO Complaints and engages in an analysis of Jordan's temporary assignment to the FFT and her return to her regular duties. *See* Def.'s Exh. 17, pp. 17-22 (finding that Jordan's preference for working on the FFT did not constitute an adverse employment action and she failed to show pretext).

Jordan's non-reassignment allegation, and the loss of any overtime hours available to her as a member of the FFT, arise from the same transactions or occurrences already litigated and ruled upon. Any allegation stemming from this same nucleus of factual allegations would necessarily be the subject of Jordan's January and December1996 EEO Complaints, that were considered by Judge Young in *Jordan IV*.[7] "Once 'a transaction has caused injury, all claims arising from that transaction must be brought in one suit or be lost.'" *Anderson v. Chrysler Corp*., 99 F.3d 846, 852 (7th Cir.

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[7] *See, e.g*., Def.'s Exh. 17, p. 17 ("In her EEO Complaints, Plaintiff alleges that the decisions to terminate her detail and to deny her a reassignment to the FFT were made in retaliation for her prior EEO Complaints and because of her race.").

1996) (*quoting Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589, 593 (7th Cir.1986)).

Even the addition of a few new *de minimis* allegations does not obviate the fact that these are essentially the same two claims that have been or could have been raised before the Court in Jordan's previous cases. This decision comports with the policy considerations that underlie *res judicata*, which "serves the interests of judicial economy and finality in disposition of disputes by precluding parties to a judgment and their privies from relitigating the same cause of action." *Durhan v. Neopolitan*, 875 F.2d 91, 93-94 (7th Cir. 1989) (footnote omitted).

IV. CONCLUSION

For the reasons stated herein, the Court **GRANTS** defendant's, Tom Ridge, Secretary, United States Department of Homeland Security, Motion for Summary Judgment.

IT IS SO ORDERED this 22nd day of February, 2005.

LARRY J. McKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

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